

130 FERC ¶ 61,024  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Equitrans, L.P.

Docket Nos. RP09-1043-000  
RP09-1043-001  
RP09-1043-002

ORDER ON NON-CONFORMING SERVICE AGREEMENTS

(Issued January 8, 2010)

1. Equitrans, L.P. (Equitrans) has filed for review, pursuant to section 154.1(d) of the Commission's Regulations,<sup>1</sup> multiple non-conforming service agreements that potentially materially deviate from its Form of Service Agreements. On October 29, 2009, the Commission accepted Equitrans's non-conforming agreements, effective on the dates requested, subject to further review.<sup>2</sup> Having reviewed the agreements further, we now accept them, effective on the dates requested, subject to the conditions discussed below in this order.

**Discussion**

2. As noted in the October 29 Order, Equitrans has undertaken a review of all of its effective transportation and storage service agreements. Equitrans reports that it has 57 currently effective service agreements and that 55 of them deviate in some way from their respective *pro forma* service agreement. Equitrans now asks the Commission to accept those agreements as not materially deviating from Equitrans's Form of Service Agreements or as deviating in ways that are not unduly discriminatory.

3. Equitrans argues that all of the deviations in its agreements are best thought of as falling into eight categories, as follows:

- (i) Minor, Clerical, Administrative, Labeling, or Typographical
- (ii) Party Identifier Language

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<sup>1</sup> 18 C.F.R. § 154.1(d) (2009).

<sup>2</sup> *Equitrans, L.P.*, 129 FERC ¶ 61,078 (2009) (October 29 Order).

- (iii) Omission of Non-Material Language
- (iv) Substitution/Relocation of Non-Material Language
- (v) Discretionary Approval Right Granted to Equitrans
- (vi) Alteration/Addition/Omission of Retainage/Retention Language
- (vii) Alteration/Addition/Omission of Nomination or Injection Language
- (viii) Alteration/Addition/Omission of Effective Term (Period) of Service

Of these categories, Equitrans argues that only the final one regarding the term of service warrants filing the service agreements with the Commission for review as a potentially materially non-conforming agreements.<sup>3</sup> We discuss the deviating service agreements below, reviewing the eight categories in the order suggested by Equitrans.

4. The present filing is part of Equitrans's multi-step plan to comply with the Commission's policies concerning the filing of service agreements with material deviations, which also involves filing revised forms of service agreements for all of its transportation and storage services. Equitrans states that once the revised forms of service agreements are approved by the Commission, it will negotiate new agreements with its customers. Equitrans believes it can re-execute the new service agreements within 90 days of such approval.<sup>4</sup>

5. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the Commission.<sup>5</sup> In *Columbia Gas Transmission Corporation*,<sup>6</sup> the Commission clarified that a material deviation is any provision in a service agreement that: (a) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff, and (b) affects the substantive rights of the parties. However, not all material deviations are impermissible. If the Commission finds that such deviation does not constitute a substantial risk of undue discrimination, the Commission may permit the deviation.<sup>7</sup> Therefore, there are two general categories of material deviations: (a) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers, and (b) provisions the Commission can permit without a substantial risk of undue

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<sup>3</sup> Equitrans, September 14, 2009 Initial Filing at 3, 4, Appendixes B, C.

<sup>4</sup> Initial Filing at 4.

<sup>5</sup> 18 C.F.R. § 154.1(d) (2009).

<sup>6</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001).

<sup>7</sup> *Id.* at 62,004.

discrimination. Moreover, if the Commission determines the agreement contains a material deviation that is permissible, the Commission's regulations require the pipeline to file tariff sheets that reference the materially deviating contract.<sup>8</sup>

### **Non-Substantive Deviations**

6. For the first five categories of deviations as listed by Equitrans – that is, those involving typographical changes, party identifier language, the omission of non-material language, the substitution/relocation of non-material language, and discretionary approval rights – we find that Equitrans has accurately characterized the deviations. Except as noted below, we find that these deviations do not affect the substantive rights of the parties, and we accept them accordingly.

7. We remind Equitrans that it should seek to avoid non-substantive deviations when it re-executes new service agreements pursuant to its planned new Form of Service Agreements. Deviations that appear immaterial in some instances may prove to be contentious in future, unforeseen circumstances. For example, reference mistakes, where a reference to another section or other identifier is not correct, may in some instances affect the substance of the agreement in a manner that unduly discriminates for or against the contracting party.

### **Retainage, Retention, Nomination, or Injection Language**

8. Equitrans notes multiple service agreements contain fuel retention percentages which deviate from the current fuel retention percentage in its tariff. These agreements state the specific retention percentage figures that were in effect at the time that the agreements were signed, rather than referencing the tariff page where the fuel retention percentage is stated. In the interim, Equitrans modified the fuel retention percentage in its tariff, causing these unmodified agreements to deviate from the form of service agreement. Equitrans does not offer comment on whether it believes the language itself would constitute a material deviation. Rather, Equitrans attests that “[i]n all cases the shipper was actually charged the retainage factor specified in the Tariff.”<sup>9</sup> Equitrans argues that, because these shippers were treated no differently in practice, these deviations do not affect the substantive rights of the parties and should be accepted.

9. Similarly, Equitrans states that eight of its storage service agreements require the customer to inject 99 percent of its Total Annual Storage Quantity (TASQ) by a certain date each year, while the current Form of Service Agreement requires customers to inject

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<sup>8</sup> 18 C.F.R. § 154.112(b).

<sup>9</sup> Initial Filing at Appendix C § 6.

only 97 percent of its TASQ. Equitrans explains that 99 percent was the currently-effective rate in 1993 when these non-conforming agreements were signed, and since that time Equitrans has updated its tariff to change the TASQ injection rate to 97 percent. Equitrans states that it has been applying the new rate to these eight existing storage service agreements as well.

10. In these instances, Equitrans has written into its service agreements exact numbers for certain terms that in practice have varied over time. In the case of the specific service agreements in question, we find that they all contain *Memphis* clauses authorizing Equitrans to file tariff revisions with the Commission, and stating that in the event of discrepancies between the tariff and the service agreement the tariff is supreme.<sup>10</sup> Accordingly, the deviations elsewhere in these service agreements are accepted because they do not affect the substantive rights of the parties. In order to clarify the supremacy of the tariff and avoid further confusion, however, we recommend that Equitrans use the opportunity of its planned renegotiation of its service agreements to replace some or all of these obsolete figures with references to the relevant tariff sheet number or service agreement attachment where applicable, or to otherwise clarify in each instance whether certain numbers are subject to change.

#### **Effective Term (Period) of Service**

11. Equitrans states that in multiple interruptible service agreements, it changed the language clarifying the evergreen clause of the contract's term of service. The most typical deviation replaced the phrase "One year from the effective date of this Agreement, then evergreen" with the phrase "thereafter on a month to month basis with a thirty day termination notice by either party."<sup>11</sup> Equitrans argues that "[b]ecause the agreements continued to have some form of evergreen provision there are no economic consequences resulting from these deviations." In addition, Equitrans informs the Commission that it is already working with its customers to re-execute all such agreements, once they are revised to conform to a revised Form of Service Agreement.<sup>12</sup>

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<sup>10</sup> "[A] *Memphis* clause in a contract authorizes the pipeline to make unilateral NGA section 4 filings to change the rates, terms, and conditions under which the pipeline will provide the service included in the customer's contract." *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678-A, 117 FERC ¶ 61,190, at P 7 (2006) (order on clarification and reh'g). *See also United Gas Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

<sup>11</sup> *See* Initial Filing at Appendix C § 8.

<sup>12</sup> *Id.*

12. Deviations in the terms under which agreements may be renewed are material. As the Commission held in Order No. 637<sup>13</sup> and clarified in subsequent orders, pipelines may agree to a specific rollover provision with a given shipper but must offer such contract extension provisions on a non-discriminatory basis. The Equitrans Form of Service Agreements and tariff leave the term “evergreen” undefined.<sup>14</sup> Its non-conforming agreements, by contrast, offer mutual month-to-month extensions, thus defining both the duration of the evergreen clause and the relative rights of the parties to seek renewal. Allowing certain customers to have customized term extensions is unduly discriminatory towards those shippers whose Form of Service Agreement-provided “evergreen” rights remain unclear. Accordingly, we accept these agreements on the condition that Equitrans revise its tariff, including its Form of Service Agreement, so that evergreen provisions are clearly defined and offered on a non-discriminatory basis when it re-executes new service agreements pursuant to its planned new Form of Service Agreements.<sup>15</sup>

### **Rate Schedule LPS Service Agreements**

13. Equitrans filed two LPS service agreements, Agreement No. 381 with Dominion Field Services, Inc. and Agreement No. 385 with NJR Energy Services, as non-conforming service agreements. Rather than identifying the receipt and delivery points under the contracts, both state in Exhibit A that the Receipt Point(s) and Delivery Point(s) are “To be determined.” It appears that Equitrans has not memorialized its agreements with the counter parties to these contracts consistent with the applicable Form of Service Agreement, which provide blank spaces for insertion of the agreed-to receipt and delivery points. Such practice could be potentially unduly discriminatory, because it could provide greater flexibility to the parties and, therefore, change the character of service.

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<sup>13</sup> *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,091, at 31,341 (2000); *order on reh’g*, Order No. 637-A, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,099; *order denying reh’g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000); *Interstate Natural Gas Association of America v. FERC*, 285 F. 3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002).

<sup>14</sup> Section 21.3 of the General Terms and Conditions, Third Revised Sheet No. 267, mentions “evergreen provisions are not subject to pre-granted abandonment” but does not elaborate on how evergreens are to be granted or applied.

<sup>15</sup> See *Saltville Gas Storage Company L.L.C.*, 110 FERC ¶ 61,324, at P 16 (2005); *Kinder Morgan Interstate Gas Transmission*, 107 FERC ¶ 61,096, at P 5 (2004).

14. We accept these agreements on the condition that Equitrans revise the agreements to include the receipt and delivery point(s), applicable to the services provided.

The Commission orders:

(A) Equitrans's non-conforming service agreements are accepted, effective on the dates requested, subject to the conditions discussed in this order.

(B) Equitrans is directed to file a revised tariff sheet in this docket listing its non-conforming service agreements within 15 days of when Equitrans has completed executing new conforming service agreements, replacing those agreements conditionally accepted above, pursuant to its planned Form of Service Agreements.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.